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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1321~~. ~~605~~ 455 204

THE IMPERIAL FIRE INSURANCE COMPANY OF LONDON, ENGLAND, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF COOS, IN THE STATE OF NEW HAMPSHIRE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

FILED SEPTEMBER 29, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1321.

THE IMPERIAL FIRE INSURANCE COMPANY OF LONDON, ENGLAND, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF COOS, IN THE STATE OF NEW HAMPSHIRE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 13, 1890.

1 UNITED STATES OF AMERICA, } ss:
New Hampshire District, }

At a circuit court of the United States within and for the district of New Hampshire, in the first circuit, begun and holden at Portsmouth, on the eighth day of May, in the year of our Lord one thousand eight hundred and ninety, before the Honorable Le Baron B. Colt, circuit judge.

COUNTY OF COOS
v.
IMPERIAL FIRE INSURANCE COMPANY OF LONDON. } No. 344, Law Docket.

2 The writ in this case is dated the 26th day of March, 1887, and is returnable before the judges of our circuit court then next to be holden at Portsmouth, within and for the district of New Hampshire, on the ninth day of May, A. D. 1887 (the eighth day of said May being Sunday). The writ, and declaration therein, is as follows:

[L. S.] "UNITED STATES OF AMERICA, } ss:
New Hampshire District, }

The President of the United States of America to the marshal of our district of New Hampshire or his deputy, Greeting:

We command you to summon the Imperial Fire Insurance Company of London to appear (if they may be found in your district) before our judges of our circuit court next to be holden at Portsmouth, within and for our said district of New Hampshire, on the 9th day of May next, then and there, in our said court, to answer unto the County of Coos, in our district of New Hampshire, in a plea of the case, for that the defendants, at Lancaster, in said district of New Hampshire, on the twenty-fourth day of November, 1882, in consideration of seventy-five dollars, then and there paid to them by the plaintiffs, insured the said County of Coos against loss or damage by fire to the amount of five thousand dollars on their two-
story brick shingle-roof building, occupied for offices and court
3 purposes (to wit, their court-house), situated on the west side of Main street, in Lancaster aforesaid, and on the same day made and delivered to the plaintiff their policy in writing, whereby, for the consideration aforesaid, they undertook and promised the plaintiffs to pay them, out of their capital stock and funds, all such immediate loss or damage sustained by the plaintiffs (not exceeding said sum of five thousand dollars nor the interest of the assured therein) as should happen by fire to the above-mentioned building, for the term of five years from the twenty-first day of November, 1882, at twelve o'clock noon, until the twenty-first day of November, 1887, at twelve o'clock noon, to be paid in sixty days after due notice and satisfactory proofs, as required by said policy, should have been made by the plaintiffs and received at the office of the defendants at New York.

And the plaintiffs aver that on the fourth day of November, 1886, this said building was totally destroyed by an accidental fire; that on said day they were the sole and absolute owners thereof and of the land on which the same stood, the fee simple; that the
4 cash value thereof was then, to wit, fifteen thousand dollars; of all which due notice and satisfactory proofs were made to said company, at their office in New York, according to the requirement of said policy.

Yet the defendants, although sixty days *has* elapsed since said notice and proofs were made as aforesaid, though requested, *has* not paid said sum of five thousand dollars, but neglect and refuse so to do.

Also in a plea of the case, for the said Imperial Fire Insurance Company of London, at said Lancaster, on the day of the date of this writ, being indebted to the plaintiffs in the sum of six thousand dollars for goods, wares, and merchandise bargained and sold by the plaintiffs to the said defendants; and in a further sum of the same amount for goods, wares, and merchandise sold and delivered by the plaintiffs to the said defendants; and in a further sum of the same amount for work done and materials for the same pro-
5 vided by the plaintiffs for the said defendants at the said defendants' request; and in a further sum of the same amount for money by the plaintiffs lent to the said defendant at the said defendant's request; and in a further sum of the same amount for money by the plaintiffs paid for the use of the said defendants at the said defendants' request; and in a further sum of the same amount for money had and received by the said defendants to the plaintiff's use; and in a further sum of the same amount for interest for the plaintiffs' forbearance at the said defendant's request of money due and owing from the said defendant to the said plaintiffs; and in a further sum of the same amount of money found to be due from the said defendants to the said plaintiffs on account stated between them, in consideration thereof promised to pay the said several
6 sums to the said plaintiff on demand; yet no part of the said sum has ever been paid, to the damage of the said County of Coos (as they say) the sum of six thousand dollars, which shall then and there be made to appear, with other due damages.

And you have here this writ with your doings therein.

Witness Munroe R. Watte, Esquire, at Portsmouth, the 26th day of March, anno Domini 1887.

WILLIAM H. HACKETT, *Clerk.*"

The action was entered in this court at the May term thereof, A. D. 1887. The parties appeared by their respective attorneys, and thence the cause was continued from term to term until the October term, A. D. 1888, when the defendants filed their plea as follows:

"In the Circuit Court of the United States for the District of New Hampshire. October Term, 1888.

COUNTY OF COOS
vs.
THE IMPERIAL FIRE INSURANCE CO.

7 And the defendants came and offered, &c., when, &c., and say that they did not promise in manner and form as the plaintiffs have thereof declared against them, and of this they put themselves on the country.

By their attorneys, A. T. BATCHELDER &
BINGHAM & MITCHELL.

And the plaintiff doth the like.

WILLIAM S. LADD &
J. S. H. FRINK.

And on the tenth day of October, A. D. 1888, issue being joined upon the above pleading, a trial is had. At the close of the evidence the counsel for the defendants made two motions, which are filed.

These motions were each overruled.

The main proposition embodied in these motions was that upon the evidence the court should direct a verdict for the defendants, which the court declined to do, and to which exception was duly
8 taken, as will appear in the bill of exceptions hereinafter set forth, and the cause was committed to a jury duly impanneled and sworn according to law to try the said issue, who, after a full hearing of the parties, by their counsel, and of their evidence and witnesses, made return of their verdict thereon, and upon their oath said: "The jury find that the defendant- did promise in manner and form as the plaintiffs have thereof declared against them, and assess damages in the sum of fifty-five hundred and five dollars ($5,505).

And thereafter, on the same day, the defendants file the following motion to set aside the verdict:

"UNITED STATES OF AMERICA,
District of New Hampshire.

October Term, 1888.

COUNTY OF COOS
v.
IMPERIAL FIRE INSURANCE COMPANY.

Upon a verdict being rendered for the plaintiff in the above-entitled action the defendant moves that the same be set aside because it is contrary to the law and the evidence, and for a new trial.

9 A. T. BATCHELDER,
BINGHAM & MITCHELL,
Attorneys for Defendant.

The policy issued by the defendant & put in evidence is as follows:

No. 100,154. $5,000.

Imperial Fire Insurance Company of London

1803

[Vignette.]

Head office, 1 Old Broad street, London. U. S. branch, 33 Pine street, New York.

in consideration of seventy-five dollars, and of the terms and conditions herein contained, The Imperial Fire Insurance Company hereby insures The County of Coos against loss or damage by Fire to the amount of five thousand dollars, as follows: $5,000 on their two-story brick shingle-roof building occupied for offices and court purposes situate on the west side of Main street Lancaster N H $5,000 other concurrent insurance permitted. And the capital stock and funds of The Imperial Fire Insurance Company shall be subject and liable to pay to the assured or their legal representatives, all such immediate loss or damage sustained by the assured (not exceeding the sum above specified, nor the interest of the assured therein), as shall happen by Fire to the property as above situated and specified, for the term of five years, to wit, from the twenty-first day of November, eighteen hundred and eighty-two, at 12 o'clock noon, until the twenty-first day of November, eighteen hundred and eighty-seven, at 12 o'clock noon, the said loss or damage to be estimated according to the actual cash value of the property at the time of the fire, which loss or damage shall in no case exceed what it would then cost the assured to reproduce, repair or replace the same, deducting therefrom a suitable amount for any depreciation of such property from use or otherwise; and to be paid in sixty days after due notice and satisfactory proofs, as herein required, shall have been made by the assured and received at the office of the company at New York; subject, however, to the following terms and conditions:

1. The assured hereby covenants and agrees, that any application, survey, plan, statement or description connected with procuring this insurance, or referred to in this policy, is true, and shall be considered a part of this contract, and a warranty by the assured, and that any misstatement of the condition, situation or occupancy of the property insured, or the building or premises containing the same, or any concealment or omission to make known every fact material to the risk, or any overvaluation, or any misrepresentation whatever, either verbal or in writing, shall render this policy void.

2. This policy shall be void and of no effect, if without notice to this company and permission therefor in writing endorsed hereon, the assured shall now have, or hereafter make or procure, any other insurance, whether valid or not, on the property hereby insured, or any part thereof; or, if this policy be assigned before a loss; or, if

the interest of the assured be other than the entire, unconditional, and sole ownership; or, if the property insured be a building standing on ground not owned by the assured in fee simple; or, if any change take place in the title, interest, location or possession; or, if any execution be levied on the property insured, or proceedings for the foreclosure of mortgage be commenced, or the title be or become involved in litigation; or, if the property insured be removed to any other building or location than that described herein; or, if the premises shall be used or occupied, so as to increase the risk, or be or become vacant or unoccupied, or cease to be used or occupied for the purposes stated herein; or, if it be a manufacturing establishment shall run in whole, or in part at night, or over or extra time, or it shall cease to be operated; or, the risk be increased by the erection or occupation of neighboring buildings, or by any means within the knowledge or control of the assured; or, if there be kept, stored or used on the premises benzine, benzole, benzine-varnish, burning fluid, camphene, fire-works, gasoline, gunpowder, naphtha, nitro-glycerine, nitrate of soda, oily waste, petroleum or any of its products (except kerosene as hereinafter provided), phosphorus, rubber or gutta-percha cement, saltpetre, spirit gas, or any article subject to legal restriction (any custom or usage of trade or manufacture, to the contrary notwithstanding); or, if illuminating gas be generated or evaporated on the premises; or, if mechanics are employed in building, altering, or repairing the premises named herein, except in dwelling houses, where not exceeding five days in one year are allowed for repairs.

Kerosene oil, of standard quality, may be used for lights, in dwellings, churches, school-houses and stores, lamps to be filled and trimmed by daylight only; and not exceeding five barrels may be kept for sale in stores, but it shall not be handled by artificial light, unless such light be at least fifteen feet distant.

3. This company shall not be liable for loss or damage by fire, until the actual payment of the premium; nor, for loss by theft at or after a fire; nor to make good any loss or damage by fire, which shall happen or arise, by any invasion, foreign enemy, insurrection or civil commotion, or by any lawful military power, or by any usurped power, or by any person or persons engaged or concerned in any riot, or notorious resistance to the authority of magistrates, or to any other lawful authority, or by any explosion, earthquake or hurricane; nor, for any loss in buildings where fires are used unprovided with good and substantial brick or stone chimneys; nor, where stove-pipes are carried through the exterior walls, windows, or roofs of the building; nor, in consequence of any neglect, or deviation from any law, or municipal, fire, or police regulations; nor, for any loss caused by lightning, or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only; nor, when the fire is caused by a fall of the building or any part thereof, except such falling be the result of a fire; nor, for any loss of or upon merchandise in show-windows, where the fire originates from, or is caused by the lights in such windows, or the lighting thereof; nor, from ashes deposited in wood;

nor, for loss or damage to any building, beyond what it would cost to rebuild (in case of a total loss) or repair (in case of a partial loss) in the same manner, of the same material, and like the one damaged or destroyed; nor, for loss or damage by removal of property from a building when there is no loss by fire, unless such removal was necessary to preserve the property, in which case the loss and damage shall be borne by both parties in proportion as the whole sum insured bears to the whole value of the property insured; nor, for loss or damage caused by neglect of the assured to use all practicable means to save and protect the property from loss and damage, at and after the fire; and there can be no abandonment to the company, of the property insured; and this company shall not be liable for loss of accounts, bills, deeds, notes, manuscripts, evidences of debt, securities of property of any kind, money or bullion. If a building or any part thereof shall fall, except as the result of a fire, all insurance by this company on it, or its contents, shall immediately cease and determine.

4. This insurance does not apply to or cover goods held on storage or for repairs; nor commissions on merchandise in hands of consignees; nor profits; nor plate, jewels, watches, precious stones, ornaments, medals, engravings, paintings and their frames, musical or scientific instruments or apparatus, (piano-fortes in dwellings excepted) models, casts, curiosities, sculpture, drawings, patterns, tools, moulds, lasts, printed books and music, frescoes and wall decorations, memorial windows, tablets, plates of glass or mirrors of the dimension of nine square feet or more, fences and yard fixtures, awnings, signs, sidewalks, prismatic lights outside the wall lines of any building, store furniture, fixtures, counters and shelving, unless separately and specifically mentioned.

5. Relating to the agent, and the renewal and cancellation of policy.

1st. Only such persons as shall hold the written commission of this company shall be considered as its agents in any transaction relating to this insurance or any renewal thereof, or the payment of premium to the company. Any other person shall be deemed to be the agent of the assured, and payment of the premium to such person shall be at the sole risk of the assured.

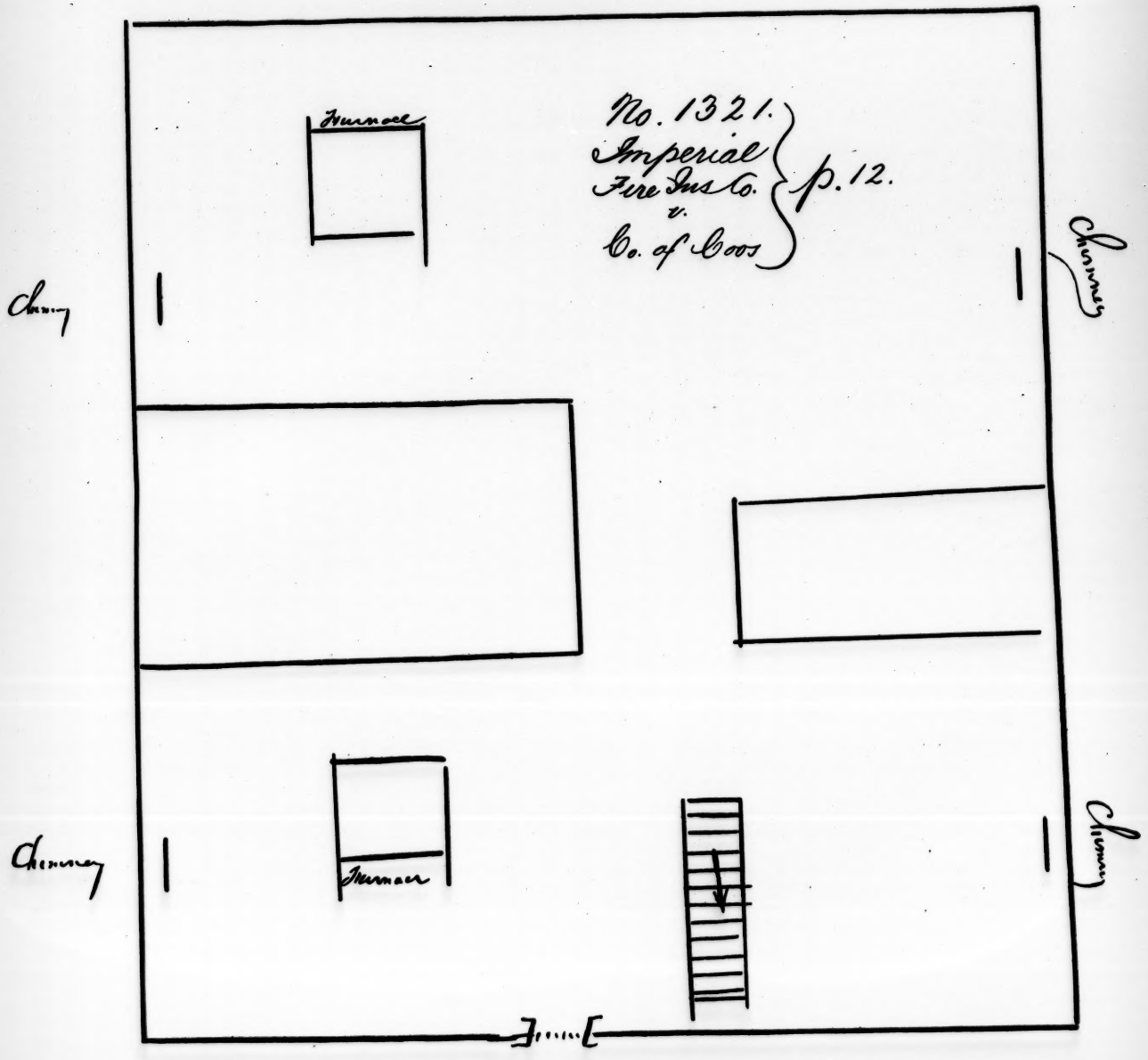
2d. This insurance, the risk not being changed, may be continued for such further time as shall be agreed on, and it shall be considered as continued under the original representation, and for the original amounts and divisions, unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, within the knowledge of the assured, not made known to the company at the time of renewal, this policy and renewal shall be void.

3d. This insurance may be terminated at any time by request of the assured. It may also be cancelled by the company by giving notice to that effect to the assured, or to the person who may have procured this insurance to be taken by this company.

On surrender of this policy, the company shall refund any

Diagram original shown to the jury at the trial

Basement



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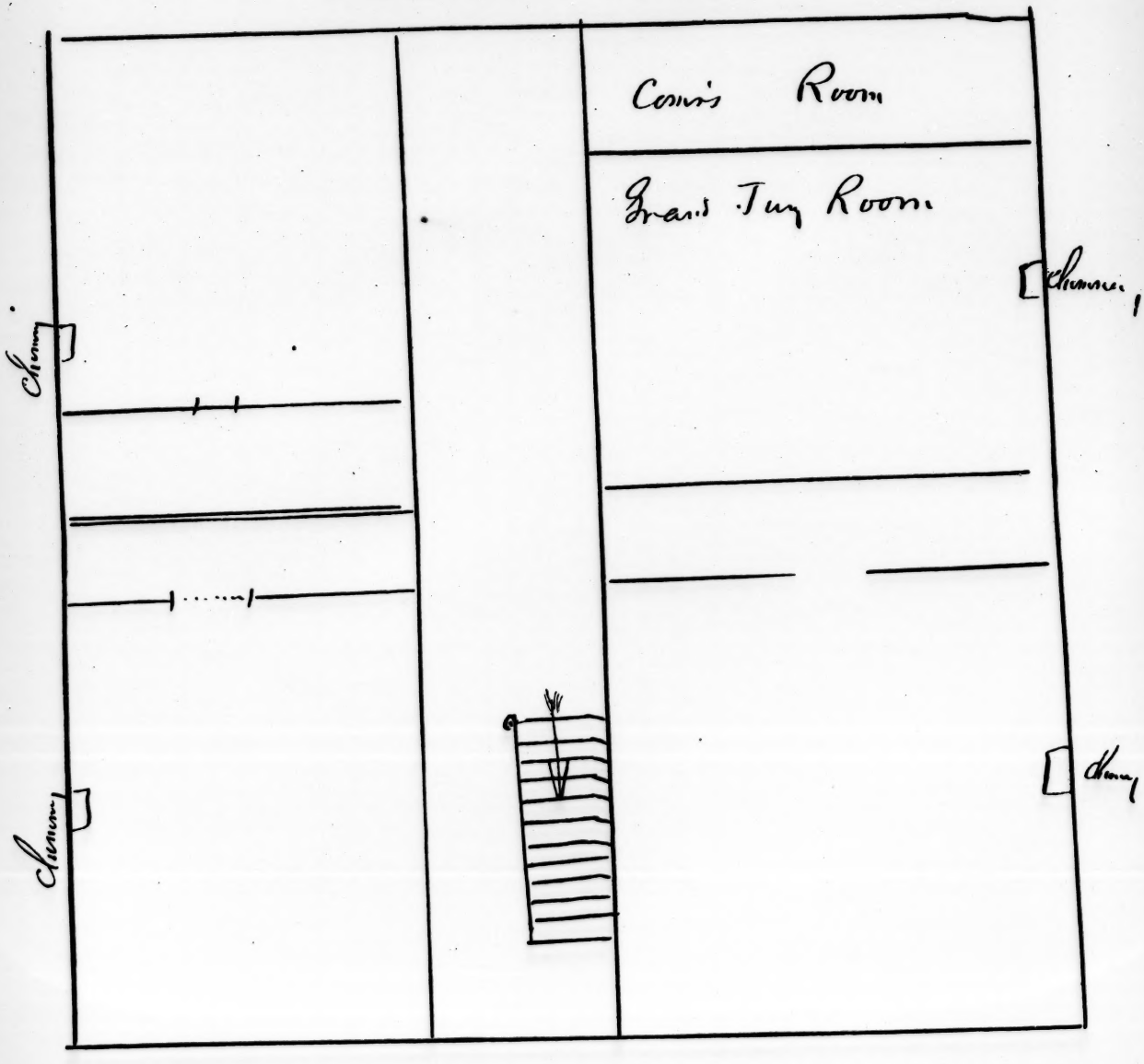
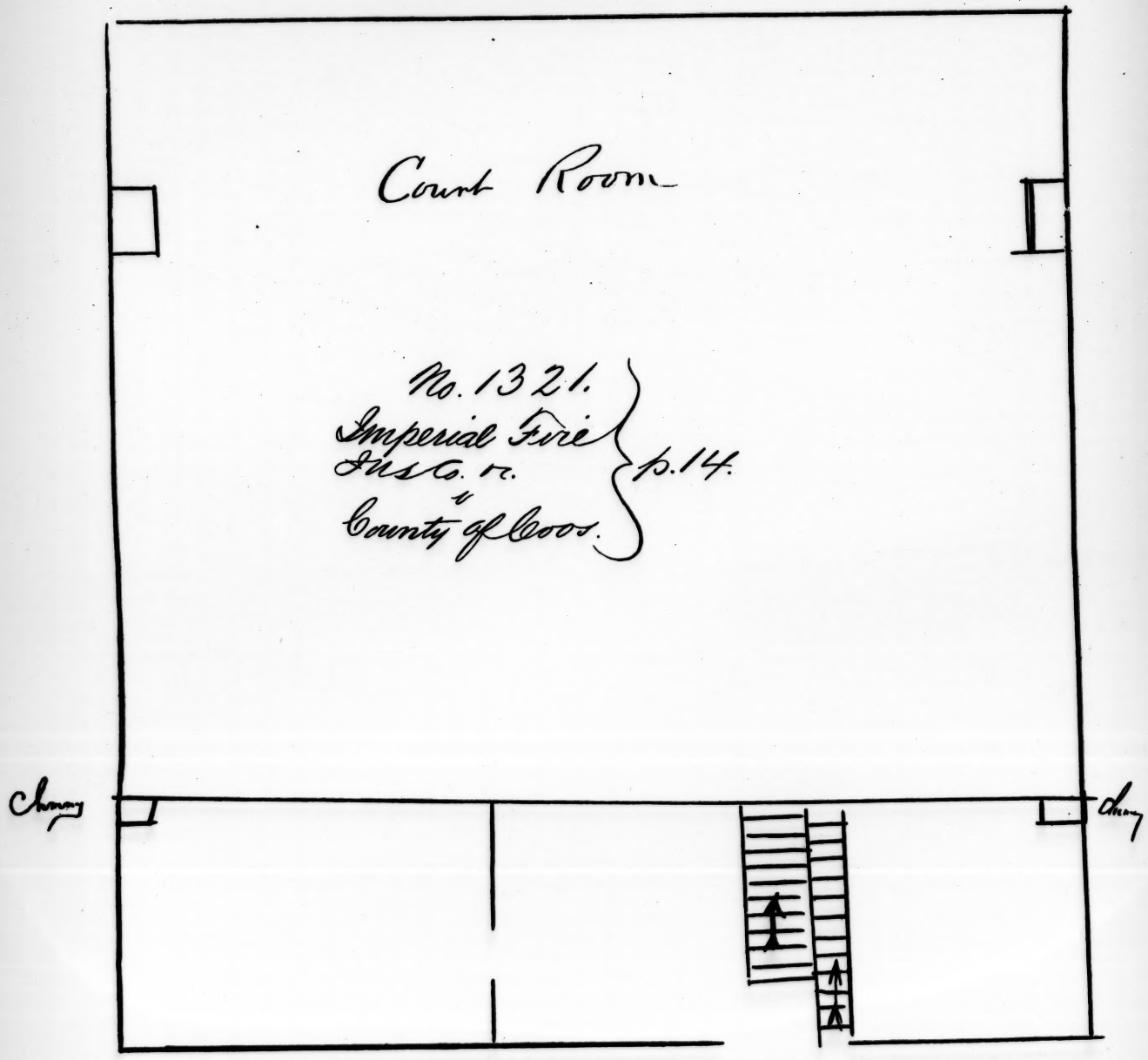
First Floor



Second Flour



premium that it has received reserving the usual short rates in the first case and *pro rata* rates in the other case.

6. Proceedings in case of loss.

It being understood and agreed, that all proceedings after a loss shall be in accordance with the terms and stipulations printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be resorted to in order to determine the rights and obligations of the parties hereunto.

7. No agent has power to waive any condition of this contract.

Provided always, and it is hereby expressly agreed and declared and the true intent and meaning hereof is that the capital stock and funds of the said company shall alone be answerable to the demands thereupon under this policy, and that no member of the said company shall, upon any account or pretence whatsoever, be subject or liable to any demands against the said company beyond his share of the capital stock or funds of the said company, and which share is set opposite to his signature to the deed of settlement establishing the said company, or mentioned in some other deed referring thereto and declaring him to be a member thereof, anything contained in this policy to the contrary notwithstanding.

In witness whereof, The Imperial Fire Insurance Company has caused this policy to be signed by its Resident Manager at New York, acting under power of attorney; but the same shall not be binding until countersigned by the duly authorized and commissioned agent, at Lancaster, N. H.

R. D. ALLIGER,
Resident Manager.

Countersigned at *Lanchester*, N. H., this 21st day of November, 1882.

DEXTER CHASE, *Agent.*

Please read your policy and its conditions.

11 [Endorsed:] 0305. Manchester, N. H. No. 100,114. Expires 21st day of November, 1887. 22747. Imperial Fire Insurance Co. of London. [Vignette.] 1803. Assured The County of Coos. Location, Lancaster, N. H. Sum insured, $1,200. Rate, 1½ %; premium, $75.00. D. Chase, agent, Lancaster. Edition 1882.

[Stamped across face of endorsement in red ink:] Cancelled Mar. 1, 1886. S. R. rates, Return Premium, $1.80.

(Here follow diagrams marked pp. 12, 13, and 14.)

Head office: Imperial building, 1 Old Broad street, London.

Directors in London: J. D. Alexander, Esq., Richard J. Ashton, Esq., Charles Barclay, Esq., Thomas G. Barclay, Esq., R. C. L. Bevan, Esq., Percival Bosanquet, Esq., James Brand, Esq., Charles Cave, Esq., Sir. G. H. Chambers, J. D. Crum-Ewing, Esq., Henry Davidson, Esq., H. W. Eaton, Esq., M. P., Horace B. T. Farquhar, Esq., Geo. Hanbury Field, Esq., John S. Gilliat, Esq., Alfred Gouger, Esq.,

damage to, or cash value of the property at the time of the fire, nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage, than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies, and without reference to the solvency or liability of other insurers; and in case of the assured holding any other policy in this or in any other company, on the property insured, subject to the conditions of average, this policy shall be subject to average in like manner.

Re-insurance to be on the basis, that in no event will this company be liable for a sum greater than the portion re-insured bears to the whole sum insured by the company re-insured, and in case of loss this compony to pay *pro rata*, at and in the same time and manner as the company re-insured.

If claim shall be made against this company by a mortgagee holding this policy as collateral security, and this company shall pay the same and claim that as to the mortgagor or owner no liability existed, this company shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collaterel to the mortgage debt, to the extent of such payment, or, at its option, may pay the mortgagee the whole principal due or to become due on the mortgage, with interest, and shall receive therefor a full assignment and transfer of the same, and all other securities held as collateral to the mortgage debt.

When this company shall claim that the fire was caused by any act or omission of any person, town or corporation, which created a cause of action, the assured shall on receiving payment assign to this company such cause of action, or if requested, shall prosecute therefor at the expense and for the account of this company.

It is expressly covenanted by the parties hereto, that no suit or action against this company for the recovery of any claim by virtue of this policy, shall be instituted or sustainable in any court of law or chancery, unless such suit or action shall be commenced within twelve months next after the fire shall have occurred; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

R. D. ALLIGER,
Resident Manager.

15 The bill of exceptions allowed by the court on the 9 of January, A. D. 1889, is as follows:

In the Circuit Court of the United States for the District of New Hampshire. October Term, 1888.

COOS COUNTY
v.
IMPERIAL INSURANCE COMPANY.

Defendant's Bill of Exceptions.

The action is assumpsit upon a five-thousand-dollar policy of insurance issued by the defendant November 6, 1882, for five years, insuring the plaintiff's court-house, in Lancaster.

The building insured was two-story, having on the first floor the offices of registers of deeds and probate, clerk of court, and county commissioners; the court-room was on the second floor. At the date of the policy there were two brick vaults, one, 8 x 13 feet, for the use of the probate office, and the other 16 x 13 feet, for the use of the offices of the register of deeds and clerk of court, there being a partition in the center separating the part used by the register from that used by the clerk.

The fire which destroyed the insured premises occurred about two o'clock in the morning of November 4, 1886.

The policy in suit contains the following: "Payment in case of loss is upon the following terms and conditions."

And among the terms and conditions are the following:

"This policy shall be void and of no effect if, without notice to this company and permission therefor in writing endorsed hereon, * * * the premises shall be used or occupied so as to increase the risk * * * or the risk be increased * * * by any means within the knowledge or control of the assured, * * * or if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling-houses, where not exceeding five days in one year are allowed for repairs.

In August, 1886, the plaintiff, without the written consent of the defendant and without its knowledge, employed wood-carpenters and brick-masons and reconstructed and enlarged the vaults, making that of the office of the register of probate 12 x 13 feet instead of 8 x 13 feet, as it was at the date of the policy, and making those
16 of the offices of the register of deeds and clerk of court 22 x 13 instead of 16 x 13 feet, as at the date of the policy. The foundations were also reconstructed and enlarged to correspond with the enlargement of the vaults. The reconstruction and enlargement of the vaults necessitated the cutting of the floors and ceilings of the respective offices in which they were, so as to extend the vaults.

The time during which these mechanics were employed in the reconstruction and enlargement of the foundations and vaults was about five or six weeks. Some painting was also done incident to the above changes, but the extent did not distinctly appear.

In addition to the foregoing the plaintiff also changed the method of heating the offices of the register of probate and clerk of court, placing a hot-water coil in the furnace in the basement, from which ran pipes through the floors and were attached to radiators in those offices. This work was commenced November 2d, and completed about midnight November 3d, 1886. No permission to make this change in the method of heating was either obtained or requested, and the defendant had no knowledge of its being done. In the evening of November 3rd a fire was built in the furnace to test the heating apparatus and heat the radiators so they might be bronzed, and the fire was left burning at about midnight, when the mechanics and some of the county officers left the building.

From the time work began upon the vaults, early in August, until the fire, the papers and records of the offices of the clerk of court and registers of probate and deeds were in the court-room or in the respective offices, unprotected by any safes or vaults.

The expense of the labor and raw material of the foregoing alterations was about $3,000.00.

The defendant contended that the foregoing alterations, rebuilding, and repairs were extraordinary and not ordinary repairs, such as were necessary in the use of the premises insured, and such as might have been contemplated by the parties when the contract was made, and the following request for a ruling was made to the presiding judge, viz:

"The defendants request the court to rule that the building, altering, and repairing of the premises to the extent of tearing down several partitions, cutting away a portion of the floors in several rooms, tearing down the vault and enlarging and rebuilding it, and by changing the method of heating a portion of its building by putting in piping and radiators for hot water or steam—all at the expense of several thousand dollars, for the labor of mechanics, for raw materials—was a building, altering, or repairing of the premises which increased the risk, and the policy thereby became void."

The court declined to rule as requested, and the defendant excepted.

Upon the conclusion of the testimony, which proved the foregoing facts, the defendant made the following motion that a verdict be directed, viz:

17 "The defendants move that a verdict be directed for them on the ground that there is no evidence competent to be submitted to the jury that the building, altering, and repairing shown by the evidence was not such building, altering, and repairing as avoided the policy."

The motion was denied by the court, and the defendant excepted.

The defendant requested the court to instruct the jury—

"That if the work done by the mechanics, as disclosed by the evidence, increased the hazard while such work was being done, then the plaintiff is not entitled to recover."

The court refused to give this instruction, and the defendant excepted.

The court in the course of their instruction to the jury instructed them as follows:

"The identical question before you is whether at the time the fire took place what the County of Coos had done in the way of alterations and repairs increased the risk at that time—that is, at the time of the fire—that is, on the night of November 4th—that the County of Coos had done in the way of repairs, changing the vaults, putting in additional heating apparatus—did those things increase the risk at that particular time? Not whether mechanics two days previously or three days previously or a week previously had worked in that building. What was the condition of the building on the night of the fire? Had what the County of Coos did in making those repairs increased the risk or had it not? Were the repairs ordinary or necessary and accompanied by no increase of risk, or were they of such an extraordinary and material character upon that particular night—that is, the condition in which the building was upon that particular night—that the risk was increased, and therefore the assured, the county, violated this condition in the policy, and consequently the defendant company should not be held liable."

To this instruction the defendant excepted. Upon the return of a verdict for the plaintiff the defendant moved that the same be set aside because it is contrary to the law and the evidence, and for a new trial.

The foregoing bill of exceptions is hereby allowed.

LE BARON B. COLT,
Circuit Judge.

A copy.
Attest: WILLIAM H. HACKETT, *Clerk.*

Filed Jan. 9, 1889.

18 [Endorsed:] 344. In the circuit court of the United States for the district of New Hampshire. Coos County *v.* Imperial Insurance Co. Defendant's bill of exceptions. Filed Dec. 6, '88.

19 And now, at the May term of said circuit court, held at Portsmouth, within & for said district of New Hampshire, the motion for new trial is withdrawn and a bill of exceptions is signed by the presiding judge, and by his direction judgment was ordered upon the verdict for the amount of the verdict, with interest from the date of its being rendered, and costs of suit.

And afterwards, to wit, on said twelfth day of May, A. D. 1890, on which day the judgment above recited was ordered, a writ of error was allowed, and a citation issued in said case, of which the following are the originals:

20 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of New Hampshire, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the County of Coos, in the State of New Hampshire, plaintiff, and the Imperial Fire Insurance Company of London, England, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Imperial Fire Ins. Co., plaintiff, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
21 of the said Supreme Court, the twelfth day of May, in the year of our Lord one thousand eight hundred and ninety.

[Seal of Circuit Court, New Hampshire.]

WILLIAM H. HACKETT,
Clerk of the Circuit Court of the United States for the District of New Hampshire.

Allowed by—
LE BARON B. COLT,
Circuit Judge.

22 [Endorsed:] No. 344. Circuit court of U. S., district of New Hampshire. The Imperial Fire Insurance Company of London, England, plaintiff in error, *v.* The County of Coos, def't in error. Writ of error. Filed May 12, 1890.

23 THE UNITED STATES OF AMERICA, *District of New Hampshire,* } *ss:*

To the County of Coos, in the State of New Hampshire, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Hampshire, wherein the Imperial Fire Insurance — of London, England, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered

against said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Portsmouth, this twelfth day of May, 1890.

LE BARON B. COLT,
Circuit Judge.

24 Service of the within citation admitted on this twelfth day of May, A. D. 1890.

J. S. H. FRINK,
Counsel for County of Coos.

25 [Endorsed:] No. 344. Circuit court of the U. S., district of New Hampshire. The Imperial Fire Insurance Company of London, England, plaintiff in error, *vs.* The County of Coos, def't in error. Citation. Filed May 12, 1890.

26 UNITED STATES OF AMERICA, *New Hampshire District*, } *ss:*

I, William H. Hackett, clerk of the circuit court of the United States for the first circuit and district of New Hampshire, certify that the foregoing is a true copy of the record and of all proceedings in the cause of the County of Coos, plaintiff, against The Imperial Fire Insurance Company of London, defendant, in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Portsmouth, in said district, on this third day of June, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

Seal of Circuit Court, New Hampshire.

WILLIAM H. HACKETT,
Clerk of said Circuit Court.

Endorsed on cover: New Hampshire C. C. U. S. No. 1321. The Imperial Fire Insurance Company of London, England, plaintiff in error, *vs.* The County of Coos, in the State of New Hampshire. Filed September 29, 1890.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 1321.

THE IMPERIAL FIRE INSURANCE COMPANY OF LONDON,
Plaintiff in Error,

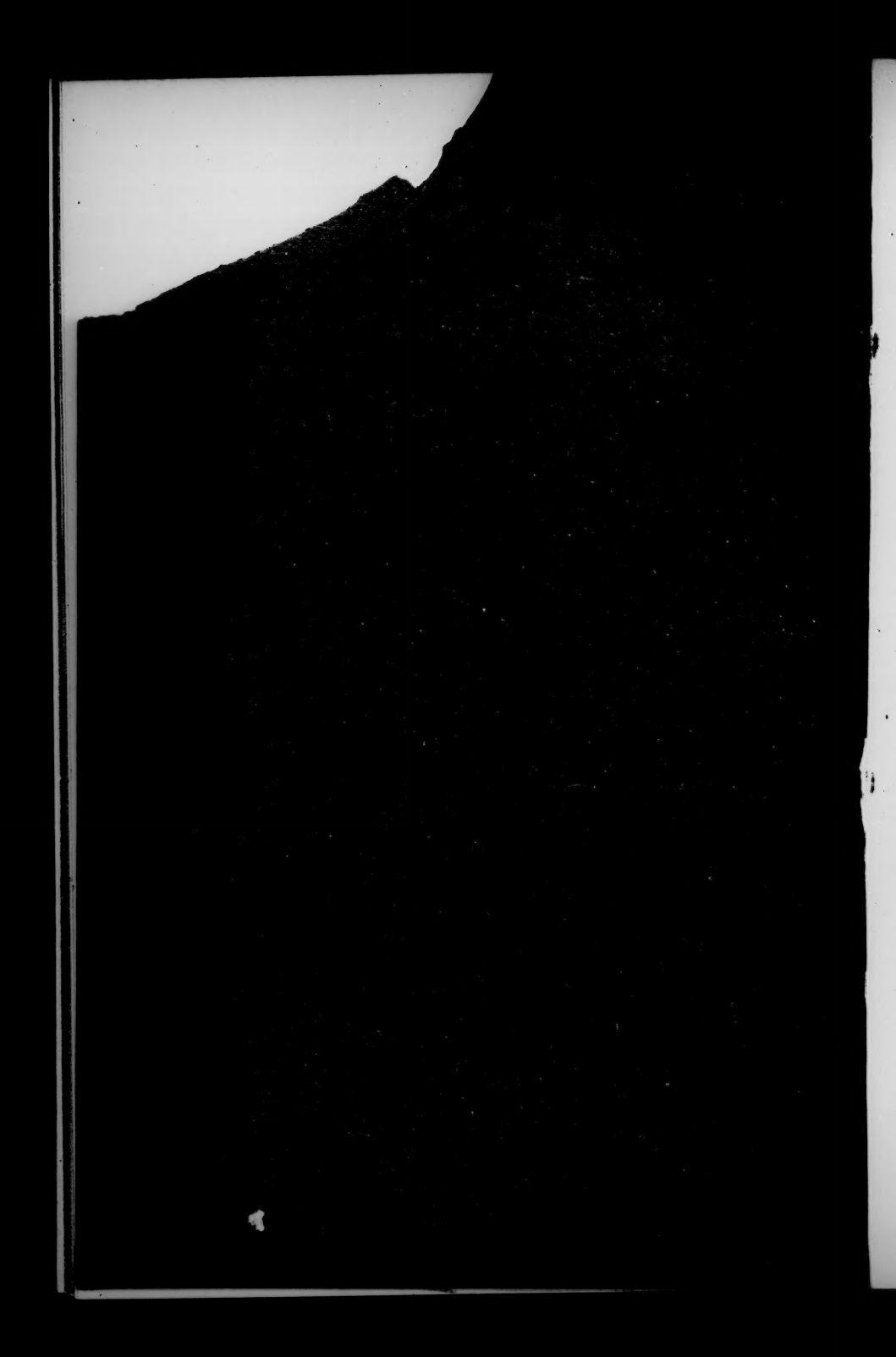
vs.

THE COUNTY OF COÖS, IN THE STATE OF NEW HAMPSHIRE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

Argument for the Plaintiff in Error.

HARRY BINGHAM,
Counsel for Plaintiff in Error.



Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 1321.

THE IMPERIAL FIRE INSURANCE COMPANY OF LONDON, ENGLAND,
Plaintiff in Error,

v.

THE COUNTY OF COÖS, IN THE STATE OF NEW HAMPSHIRE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

ARGUMENT OF HARRY BINGHAM,

Counsel for Plaintiff in Error.

I.

Statement of the Case.

This is a bill of exceptions, allowed by the Circuit Court of the United States, for the District of New Hampshire, to correct the errors of that court, in the trial of an action of assumpsit brought by the defendant in error against the plaintiff in error, upon a five thousand dollar policy of insurance, dated November 6, 1882.

The policy in suit covered the court-house in Lancaster, Coös county, New Hampshire, which is fully described in the record, on page 211.

This building was destroyed by fire on November 4, 1886, at two o'clock in the morning.

This insurance policy contained the following clause: "Payment in the case of loss is upon the following conditions," and among the terms and conditions are the following:

"This policy shall be void and of no effect if, without notice to this company and permission therefor in writing endorsed thereon, . . . the premises shall be used or occupied so as to increase the risk, . . . ; or the risk be increased . . . by any means within the knowledge or control of the assured; . . . or, if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling-houses, where not exceeding five days in one year are allowed for repairs."

In August, 1886, the assured, without the written consent of the insurer, and without its knowledge, employed wood carpenters and brick masons, and reconstructed and enlarged the vaults, making that of the office of the register of probate 12x13 feet, instead of 8x13 as it was at the date of the policy, and making those of the offices of the register of deeds and clerk of court 22x13, instead of 16x13 feet as at the date of the policy. The foundations were also reconstructed and enlarged to correspond with the enlargement of the vaults. The reconstruction and enlargement of the vaults necessitated the cutting of the floors and ceilings of the respective offices in which they were, so as to extend the vaults.

This work occupied five or six weeks. There was, also, some painting done during the same time, incident to these alterations; and the method of heating the offices of the register of probate and clerk of the court was changed by putting in hot-water pipes and radiators. The work in making this change in the method of heating was completed about midnight of November 3, 1886, about two hours before the fire was discovered. This last named work, as well as the other, was done without the knowledge or consent of the insurer.

During the whole time occupied in making these alterations and repairs, the papers and records of the different offices in the building were unprotected by either safes or vaults. The cost of these several alterations and repairs was about three thousand dollars.

II.

Specification of Errors.

1. The court erred in declining to rule that "the building, altering, and repairing of the premises, to the extent of tearing down several partitions, cutting away a portion of the floors in several rooms, tearing down the vault and enlarging and rebuilding it, and by changing the method of heating a portion of its building, by putting in pipe and radiators for hot water or steam, all at the expense of several thou-

sand dollars for the labor of mechanics, for raw materials, was a building, altering, or repairing of the premises which increased the risk, and the policy thereby became void."

Record, *p.* 12.

2. The court erred, also, in denying the motion to direct a verdict for the insurer, "on the ground that there is no evidence competent to be submitted to the jury that the building, altering and repairing, shown by the evidence, was not such building, altering and repairing as avoided the policy."

Record, *p.* 12.

3. There was error, too, in the court's declining to give the jury the instruction requested, viz., "That, if the work done by the mechanics, as disclosed by the evidence, increased the hazard while such work was being done, then the plaintiff is not entitled to recover."

Record, *p.* 12.

4. The court also erred in giving the jury the following instructions:

"The identical question before you is, whether, at the time the fire took place, what the county of Coös had done in the way of alterations and repairs increased the risk at that time; that is, at the time of the fire—that is, on the night of November 4th—that the county of Coös had done in the way of repairs, changing the vaults, putting in additional heating apparatus—did those things increase the risk at that particular time? Not whether mechanics, two days previously, or three days previously, or a week previously, had worked in that building. What was the condition of the building on the night of the fire? Had what the county of Coös did in making those repairs increased the risk, or had it not? Were the repairs ordinary or necessary, and accompanied by no increase of risk, or were they of such an extraordinary and material character upon that particular night—that is, the condition in which the building was upon that particular night—that the risk was increased, and, therefore, the assured, the county, violated this condition in the policy, and consequently the defendant company should not be held liable."

Record, *p.* 13.

5. The refusal of the court, on the return of the verdict, to grant the insurer's motion "that the same be set aside, because it is contrary to the law and the evidence, and for a new trial," was error.

Record, *p.* 13.

III.

ARGUMENT.

I. Upon the foregoing facts and assignment of errors the insurer takes the following legal positions.

First. The assured, the county of Coös, having made extensive repairs upon the insured premises, and having neither notified the plaintiff in error, the insurer, thereof, nor obtained its consent, in writing, therefor, the conditions of the policy were violated, and, by its terms, the contract terminated.

Second. The court should have instructed the jury that if the work done by the mechanics increased the hazard, *while the work was in progress*, then the assured would not be entitled to recover, because when the hazard was increased and the risk changed, by the acts of the assured, and without the knowledge or consent of the insurer, in that event the contract came to an end by virtue of its own expressed, unambiguous terms.

Third. It was error to instruct the jury that it was immaterial what had occurred to increase the hazard during the repairs, unless such increased hazard existed at the time of the fire.

II. The terms of the policy, or contract of insurance, is the measure of the insurer's liability. It must be liable according to those terms, or not at all. And in order to recover, the assured must show itself within those terms; and that the contract has not been brought to an end by the assured's violation of its conditions. The performance of the assured's part of the contract is a condition precedent to its right to recover. If it has violated or not performed the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is unnecessary to inquire the reason for the condition or provision in controversy, or any other condition or provision of the policy. It is enough that the parties have entered into and become parties to it.

"In the construction of contracts words are to be understood in their ordinary and popular sense, except in those cases in which words used have acquired by usage a peculiar sense, different from the ordinary and popular use."

Moore v. *Ins. Co.*, 62 N. H.

"In this case, no words are used which have acquired by usage a different signification from the ordinary and popular one."

Baldwin v. *Ins Co.*, 60 N. H. 422.

And the words of the contract,—

"This policy shall be void and of no effect, if, without notice to this company and permission therefor in writing endorsed hereon, . . . the premises shall be used or occupied so as to increase the risk, . . . ; or the risk be increased . . . by any means within the knowledge or control of the assured; . . . ; or, if mechanics are employed in building, altering or repairing premises named herein, except in dwelling houses, where not exceeding five days in one year are allowed for repairs," mean just what they plainly express.

The provisions are reasonable.

The insurer was willing to carry the risk at the rate charged and paid so long as the premises continued in the condition in which they were at the date of the contract. But it did not propose to continue the contract under other and different conditions, and, therefore, it so expressly stipulated. And, among the altered conditions, upon the occurrence of which the company declared it would not stand liable, were (1) if the building was occupied so as to increase the risk: (2) or the risk be increased by any means within the knowledge or control of the assured; (3) or if mechanics are permitted to take possession of the building and work at rebuilding or altering the same.

The employment of mechanics, without the insurer's consent, like the alienation of the property, or its vacancy, or putting on other insurance, puts an end to the contract: and whether such working of mechanics, or alienation, or other insurance, or vacancy, does or not increase the hazard, is entirely immaterial—that question has not been left open by the parties.

It was competent for the parties to so agree, and they put their agreement in language which cannot be mistaken.

"It is competent for the insurer to prescribe the terms and conditions upon which he will assume a risk, and, so long as those conditions are not in violation of law, or contrary to public policy, they are binding and obligatory upon the assured, and any violation thereof by him releases the insurer from liability, whether the loss resulted from such violation or not. Thus, the insurer may decide what risks are *hazardous, extra hazardous, or specially hazardous*, and what are not so, and if they are named and specified in the policy, and prohibited therein, the violation of the condition voids the policy even though in fact such articles or use are not hazardous. The question is not open, whether the hazards of the risk are increased thereby or not. The insurer, by electing to regard it so, and having so declared

it in the policy, has precluded all inquiry in that direction, and, if the keeping of ice or water upon the premises was specified as hazardous, the keeping of either, without permission, would avoid the policy as much as the keeping of gunpowder or nitro-glycerine. The insurer having contracted upon that basis, the assured is estopped from denying that they are hazardous."

Wood on Insurance, section 58.

When the parties have stipulated and agreed that a prescribed condition, use, or occupation is hazardous, or causes an increase of risk, upon showing such prohibited condition, use, or occupation, the law infers an increase of risk, and a termination of the contract, and it is entirely immaterial whether the prohibited condition, use, or occupation increases the risk or not,—that question is not open to inquiry.

As laid down by the author, in Wood on Insurance, section 227,—

"When the policy stipulates against the use of the premises for certain purposes, as where a list of uses regarded as hazardous, extra hazardous, or specially hazardous is annexed to the policy, unless the use for which the premises are insured, or the description of the risk imports a license to use the premises for certain purposes named as hazardous, etc., the use of the premises for any such purposes, or the keeping of any such hazardous, etc., articles, *per se* avoids the policy, and the only question is, *whether the premises were used for such prohibited purposes, or such prohibited articles were kept*, and if so, the policy is invalidated without any reference to the question whether the risk was thereby increased or not. *The insurer has made it material by the prohibition*, and his action in that respect is conclusive, and the fact that the loss did not result from such change or risk is of no consequence. The change having been made contrary to prohibitory clause in the policy, is fatal to a recovery for a loss, from whatever cause it arises."

III. The legal position of the plaintiff in error,—that, by the employment of mechanics in altering and repairing the building insured, without the insurer's written consent, avoided the policy and terminated the contract, is fully sustained by the decisions of the Supreme Court of New Hampshire, as clearly appears from the following authorities:

(1) *Fabyan* v. *U. M. F. Ins. Co.*, 33 N. H. 203.

Assumpsit, on a policy dated October 18, 1848, for six years.

Fire occurred April 29, 1853. The 16th section of the company's act of incorporation, which was made part of the policy, provided that procuring other insurance would avoid the policy.

In May, 1849, plaintiff procured other insurance, without defendant's consent. This other insurance was for three years, and, therefore, had expired before the fire.

The court held that procuring other insurance, without the consent of the defendants, avoided the policy.

Judge Sawyer, in delivering the court's opinion, on page 207, said,—

"By the terms of the policy, this discharged the defendants from liability,—their promise contained in the policy to pay to the plaintiff, in case of loss, being upon condition that in case of such double insurance their assent thereto should be endorsed on the policy."

(2) *Shepherd* v *Insurance Co.*, 38 N. H. 232.

The policy on which this action was based, among other conditions, had one providing that an increase of the risk avoided the policy, unless an additional premium was paid; and whether there was an increase of hazard or not was held to be for the jury.

In reference to this condition the court, on page 240, said,—"The parties have the right to frame their contracts as they please in this respect, and they cannot complain if they find the stipulations to be inconvenient.

"Having contracted, subject to this express condition, the company are not bound if the condition is shown to be broken."

(3) *Gee* v. *Cheshire M. F. Ins. Co.*, 55 N. H. 65.

Plaintiff procured the policy in suit while he held a valid policy in the Niagara Fire Ins. Co. covering the same property.

In the defendant's policy there was a provision against double or other insurance, and declaring that in case of other insurance this policy should be void. The court held that the existence of the policy in the other company rendered the policy in defendant's company void.

(4) *Sleeper* v. *N. H. Fire Ins. Co.*, 56 N. H. 401.

The policy in this suit "contained a condition that it should be void if the premises should become vacated by the removal of the owner or occupant without immediate notice to the company and consent endorsed on the policy."

The occupant, a tenant, removed without the knowledge of either the plaintiff or defendant, and, of course, notice was not given.

The court held, (1) that the building was vacated within the meaning of the policy, and (2) that the prescribed notice not having been given, and the insurer's consent obtained, the policy was avoided.

Judge Smith, for the court, on page 407, said,—

"It is manifestly unjust to hold that he can, by his negligence, suffer the conditions of the contract which were to be performed on his part to be broken, and still claim to hold the other party to the performance of the contract, upon the ground that he has made a mistake in neglecting to fulfil the requirements of the contract on his part to be observed."

(5) *Hill* v. *Ins. Co.*, 58 N. H. 82.

The policy in this action provided that it should become void on the vacation of the premises insured, unless previous notice had been given the insurer of "the particulars of such vacation or removal."

Before the removal of the occupants the owner called upon the defendant's agent and informed him that the occupants were going to move, but that they were going to leave their household goods. They did not leave their household goods, as stated, but removed substantially all of them. This, the court held, was not a compliance with the terms of the contract, and consequently the assured was not entitled to recover.

In delivering the court's opinion, Chief Justice Doe, on page 83, said,—

"The increase of the risk caused by removing the goods is material. Their removal is one of the material particulars of the subject of occupation, concerning which the plaintiff gave the defendants information contrary to the event."

(6) *Baldwin* v. *Phenix Ins. Co.*, 60 N. H. 164.

This policy contained a condition that,— "If the property be sold or transferred, or any change take place in title or possession, whether by legal process, judicial decree, voluntary transfer or conveyance, then, and in every such case, this policy shall be void."

After the issuance of the policy, and before the fire, the plaintiff conveyed the premises insured to his daughter, and the daughter conveyed them to her mother,— the plaintiff's wife.

The purpose was to vest the title to the property in his wife, and thus place it beyond the reach of creditors.

The court held that this transfer avoided the policy.

The fact that it was fraudulent and void as to creditors was held to be immaterial.

Crafts v. *Ins. Co.*, 36 N. H. 44-53.

Said Judge Clark, on page 166,—

"Being valid between the parties, the conveyance without the knowledge or assent of the company was a change in the title of the property insured, such as by the terms of the policy rendered the contract of insurance void" (*Langdon* v. *Ins. Co.*, 22 Minn. 193.)

(7) *Baldwin* v. *Hartford F. Ins. Co.*, 60 N. H. 422.

This action and *Baldwin* v. *Ins. Co.*, *supra*, were brought by the same person.

Part of the insured premises had been conveyed to his wife, through the daughter. A barn covered by the policy had not been conveyed and for the loss of that he claimed to recover.

But the court held, (1) That the transfer to the wife avoided the policy; (2) that "an alienation by the insured, without notice, of one of several parcels of real estate covered by a fire policy containing a stipulation against alienation, avoids the policy as to property not alienated, unless the court can say as matter of law that the risk of the remaining property is not increased."

And upon the general rule recognized in the construction of such contracts, Judge Clark said,—

"Another general and elementary rule in the construction of contracts is, that words are to be understood in their ordinary and popular sense, except in those cases in which the words used have acquired by usage a peculiar sense different from the ordinary and popular one.

"In this case no words are used which have acquired by usage a different signification from the ordinary and popular one, and if the language is to be understood in its ordinary and popular sense, the conclusion is irresistible that the sale, transfer, or conveyance of the property insured renders the policy void, not merely as to property alienated, but void as to the whole property insured."

(8) *Moore* v. *Ins. Co.*, 62 N. H. 240.

This action was twice before the law term of the Supreme Court of New Hampshire.

It was an action upon a policy of insurance in the defendant company, dated August 15, 1876, for three years, covering a dwelling-house and shed, located in the White Mountain Notch, about two miles below the Willey House.

In the policy, among other conditions, was the following:

"If the above mentioned premises shall become vacant and unoccupied for a period of more than ten days . . . without the assent of this company endorsed hereon, . . . then and in every such case this policy shall be void."

The premises were destroyed by fire on December 18 or 19, 1876.

At the date of the policy the premises were occupied by a tenant whom the plaintiff expected would continue to occupy them until sometime in November following; and he agreed to notify the plaintiff when he left them.

August 24, the tenant left the premises, but did not notify the plaintiff. From the time the tenant left, August 24, until December 11, no one occupied the house; but the plaintiff had no knowledge of its non-occupancy until December 11.

The defendant had no information of its non-occupancy until after the proofs of loss were furnished. From December 11 to December 18 the house was occupied by two men in the plaintiff's employ. On December 18 these men got short of provisions and left the house and went to the White Mountain House to procure some. They returned on December 19, but during their absence the house was burned. Upon the first trial the defendants claimed that the non-occupancy of the house, from August 24 to December 11, being more than ten days, and being without their consent or knowledge, avoided and terminated the contract of insurance, and they requested the court to so rule and order a verdict for them.

The court declined to so rule, or grant the defendant's request for a verdict, and "instructed the jury, as a matter of law, that the policy did not become void by reason of the non-occupation of the buildings from August 24 to December 11," and to this instruction the defendant excepted.

There was a verdict for the plaintiff which the defendant moved to set aside, and this motion being denied, the defendant excepted. The court at the law term set this verdict aside, holding that,—

"A policy rendered void by the violation of a condition that the insured building shall not be unoccupied for a period of more than ten days without the insurer's consent endorsed on the policy, is not revived by the subsequent occupation of the building."

And Judge Smith, in speaking for the court, on page 243, said,—

"The contract being once terminated, it could not be revived without the consent of both of the contracting parties. It is immaterial,

then, whether the loss of the buildings is due to unoccupancy or to some other cause."

In the same opinion the court quotes from *Mead* v. *Ins. Co.*, 7 N. Y. 530, as follows:

"The only safe rule is to hold the contract of insurance at an end the moment the warranty is broken, and that it cannot be revived again without the consent of both parties, unless the insurer has, by some act or line of conduct, waived the breach or violation of the warranty."

Judge Smith further said, on page 246,—

"The strict and literal meaning of the stipulation that the policy shall be void if the premises remain unoccupied more than ten days, is not that the insurance will be suspended merely during non-occupation after the ten days, and will revive when occupation is resumed.

"In ordinary speech, a void policy is one that does not and will not insure the holder, if the insurer seasonably asserts its invalidity. It might be argued that this clause should be so construed as to accomplish no more than the purpose for which it was inserted; that its sole purpose was to protect the insurer against the risk resulting from non-occupation; and that if this risk was terminated by re-occupation, the parties intended the insurance should be suspended only during the existence of the cause of a risk which the company did not assume.

"On the other hand, it might be argued that such an intention would have been manifested by words specially and expressly providing for a suspension and resumption of the insurance, and would not have been left to be inferred from the general agreement that the policy should be void; that a final termination of the insurance at the end of ten days of non-occupation is plainly expressed by the provision that the policy shall then be void; and that the parties would not think it necessary to go further and provide that the void policy should not become valid on re-occupation."

(9) The result of the second trial of this case is found reported in *Moore* v. *Phenix Fire Ins. Co.*, 64 N. H. 140.

On the second trial it was contended by the plaintiff that whether the building was vacant and unoccupied within the meaning of the policy was a question of fact for the jury, and, also, that the property or articles left in the house by the tenant when he left it constituted an occupancy. The jury, on instructions by the court, to which the defendant excepted, found that the building had not been vacant or unoccupied for more than ten days.

The court held that the facts being undisputed, it was for the court, not the jury, to declare the rights of the parties upon those undisputed facts.

In the opinion of the court, by Judge Allen, he said, on page 145,—

"Where the undisputed facts, as naturally interpreted, show vacancy and non-vacancy and consequent increase of risk, or when there is no evidence to rebut, modify, or explain the evidence of increased danger from the change, there is no question of fact to submit to the jury, and it becomes the duty of the court to declare the verdict."

And in concluding the court's opinion, it was said,—

"There being no evidence competent to be submitted to the jury that the buildings were not for more than ten days after the insurance 'vacant and unoccupied,' and vacancy and non-occupancy being manifest from undisputed evidence, the motion of the defendants for a verdict should have been granted, and the exception to the refusal is sustained."

(10) *Dube* v. *Ins. Co.*, 64 N. H. 527.

The policy in this suit contained a provision against the assignment of the policy. The plaintiff made an assignment of his property for the benefit of his creditors.

The court held that "an assignment by a debtor of all his property, under the statute, for the benefit of his creditors, operates as an assignment of a fire insurance policy held by him, which contains a provision that it shall be void if assigned without the assent of the company."

IV. The decisions of the courts of other jurisdictions are equally decisive in support of the position and contention of the plaintiff in error.

(1) The case of *Mack* v. *Rochester Ins. Co.*, 106 N. Y. 560, is directly in point.

The policy under consideration in that case contained a condition similar to the one in the policy in this case, viz.,—"The working of carpenters, roofers, gas-fitters, plumbers, and other mechanics, in building, altering or repairing any building or buildings covered by this policy, will cause a forfeiture of all claim under this policy, without the written consent of this company indorsed hereon." It was also provided that the policy should be void if the risk be increased by any means within the control of the assured.

At the time of the insurance the building insured was used as a grocery. On October 1, 1881, it was leased to tenants "who con-

templated using it for the purpose of carrying on the business of drying fruit, and the lease provided that they should have the privilege of putting in the machinery needed for their business in the building. This business required some alterations in the structure, and the introduction therein of a furnace and wooden shafts or boxes running from the cellar to the roof, and constituting the dryers in which the fruit was intended to be cured by heat." This required the cutting of holes five feet square through each floor and the roof. From the time they began to the time of the fire, mechanics were engaged in making these changes. The mechanics were at work in making the changes at the time of the fire, and the alterations were being made without the consent or knowledge of the company.

The court held that this effected an avoidance of the policy and that the plaintiff could not recover.

In delivering the opinion of the court, Chief Justice Ruger said,—

"The provision of the policy governing the case is framed in plain, unambiguous language, and its object and design are reasonable and free from any doubt. Certain conditions are very generally regarded by underwriters as largely increasing the hazards of insurance, and they, unless corresponding premiums are paid for the extra risks, are usually intended to be excluded from the obligation of the policy. Such are the conditions in reference to unoccupied houses, changes in the occupation from one kind of business to another more hazardous, the use of inflammable substances in buildings, and their occupation by carpenters, roofers, etc., for the purpose of making changes and alterations.

"These conditions, when plainly expressed in a policy, are binding upon the parties and should be enforced by courts, if the evidence brings the case clearly within their meaning and intent. It tends to bring the law itself into disrepute, when, by astute and subtle distinctions, a plain case is attempted to be taken without the operation of a clear, reasonable, and material obligation of the contract. . . .

"The case is brought clearly within the spirit as well as the letter of the contract, and if it does not show a violation of the conditions, we can conceive of no situation which would have effected that result. In case there had been a submission of the facts to the jury, and it had found that carpenters were not engaged in making alterations of this building within the meaning of the policy, it would have been the clear duty of the court to have set aside the verdict. Courts are under no obligation to yield their assent to verdicts which deny significance to

language, or violate the plain meaning and intent of an unambiguous contract."

(2) *Lindsey* v. *Ins. Co.*, 28 Upper Canada, Queen's Bench R. 326.

This was an action upon a policy of insurance. Among the conditions of the policy, on which it would become void, was that if "any alterations or additions to the building insured in this company" are made without giving notice of such alterations to the secretary of the company, and obtaining permission therefor.

An addition was made to the building insured, but no notice thereof was given as required by the policy. The jury found that the alterations did not increase the risk, although the fire originated in the new part.

The Supreme Court held it to be entirely immaterial whether the risk was increased or not; that an alteration in the building, without notice to the company and getting consent therefor, avoided the policy.

(3) *Lyman* v. *State Mut. Ins. Co.*, 14 Allen 329.

An action on a policy of insurance. The policy contained the following clause:

"That whenever a building hereby insured shall be altered, enlarged, or appropriated to any other purposes than those herein mentioned, or the risk otherwise increased by the act or with the knowledge and consent of the assured, without the consent of the president first obtained in writing, this policy shall be void."

The policy was dated February 1, 1859, for 7 years. The building was damaged by fire January 6 and 7, 1865.

In December, 1864, the assured leased the premises and granted the right to make alterations in the building.

Workmen began to take out a set of shelves and counter and put in another counter; put in a water-closet; took out one set of stairs and put in another; put on an outside door. Most of the work was done outside the building.

The jury found that this temporarily increased the risk, but that it did not increase it permanently. The court held that by the use of the word *otherwise* in the connection in which it was used, the policy meant such *alterations*, &c., as *increased* the risk.

In the court's opinion, Judge Gray, on page 334, said,—

"The facts in this case show a deliberate and considerable alteration of the building, not incidental to the ordinary use of the property, made by the tenant with the knowledge of the assured, prolonged for three weeks, and, while it lasted, increasing the risk as the jury have found. There is nothing in the words of this condition to warrant us in holding that

an alteration which increased the risk for such a length of time did not avoid this policy, merely because the duration of the increase of risk would not be unlimited. On the contrary, one probable object of the condition requiring the written consent of the president of the company in case of increase of risk seems to us to have been to enable the insurers to charge an additional premium in such a case as this."

(4) *Lee* v. *Fire Insurance Co.*, 3 Gray 583-594.

The policy on which this action was based prohibited the use of the insured property as a grist-mill, and the jury were permitted to return a verdict for the plaintiff, although a grist-mill was carried on upon the premises. This verdict was set aside.

In the court's opinion, Judge Bigelow, on pages 589 and 590, said,—

"The effect of the evidence admitted and of the instructions founded upon it was to authorize the jury to return a verdict for the plaintiff for the amount insured by the policy, although it was proved that a grist-mill was carried on in the premises at the time of the loss. This was clearly contrary to the express stipulation in the policy, and permitted the jury to substitute, in the place of the written agreement of the parties, their acts and statements prior to the execution of the policy. . . . The agreement in the policy was that the carrying on of a trade included in the class of special risks should render the policy void.

"This was a clear and explicit stipulation, the manifest purpose of which was to exclude parol evidence as to the danger of such occupations, and their materiality to the risk, and substitute in place thereof the agreement of the parties, about which there could not be any cavil or dispute. The evidence offered by the plaintiff, and submitted to the jury under the foregoing instructions, was in direct contravention of the written contract. It not only tended to vary it by parol evidence, but directly to contradict it. It was the assured who were estopped by their own deliberate and solemn agreement in writing, and not the defendants, who relied solely on the terms of the contract which the plaintiff sought to enforce against them."

(5) *Putnam Tool Co.* v. *Fitchburg M. F. Co.*, 145 Mass. 265.

This policy prohibited the removal of the goods insured from the building in which they were at the time of the insurance without the consent of the insurer. The goods were removed without obtaining the insurer's consent. And, although it was found by the court that the removal of the goods to the place where they were burned did

not increase the risk, it was held that the removal without consent avoided the policy and defeated the plaintiff's right of recovery.

(6) In *Kyle* v. *Commercial Union Assurance Co.*, 149 Mass. 116, it was held that an illegal sale of liquor upon the premises insured, which increased the risk, avoided the policy absolutely, and not simply temporarily, during the continuance of such illegal use; and that the fact that subsequent to such illegal use and before the fire a license had been secured, did not revive the policy.

In support of the same points, the court's attention is respectfully invited to the following authorities:

Gunther v. *Liverpool Ins. Co.*, 134 U. S. 110.
Newmarket Savings Bank v. *Royal Ins. Co.*, 150 Mass. 374.
Jones Mfg. Co. v. *Ins. Co.*, 8 Cush. 82.
Harrison v. *Ins. Co.*, 9 Allen 231.
White v. *Ins. Co.*, 6 Atl. R. 113 (Penn. Oct., 1886.)
Gerard Ins. Co. v. *Hebbard*, 95 Penn. St. 45.
McGorra v. *Ins. Co.*, 54 Vt. 211.
Ins. Co. v. *Schmidt*, 13 Atl. R. 317 (Penn. Apr., 1888.)
Padelford v. *Ins Co.*, 3 R. I. 102.
Peoria Sugar Refining Co. v. *Ins. Co.*, 24 Fed. R. 973.
Sperry v. *Ins. Co.*, 26 Fed. R. 234.
Sherwood v. *Ins. Co.*, 29 Am. R. 180.
(S. C. 73, N. Y. 447.)
Hicks v. *Ins. Co.*, 60 Am. R. 781.
(S. C. 71, Iowa 119.)
Davidson v. *Ins. Co.*, 60 Am. R. 818.
(S. C. 71, Iowa 532.)
St. Paul F. M. Ins. Co. v. *Archibald & Hill*, 16 Ins. L. J. 153.
Havens v. *Ins. Co.*, 60 Am. R. 689.
(S. C. 111, Ind. 90.)
Ins. Co. v. *Lamar*, 55 Am. R. 764.
(S. C. 106, Ind. 513.)
Sutherland v. *Ins. Co.*, 31 Gratt. 176.
Ins. Co. v. *Holt*, 35 Ohio St. 189 (35 Am. R. 601.)

V. The court's instructions, in substance, that the non-observance of the conditions of the policy merely suspended the policy during such time as the conditions were ignored, was error, and clearly at variance with the current of authority upon the subject, as shown by the foregoing authorities.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1891.

No. 1321.

THE IMPERIAL FIRE INSURANCE COMPANY OF LONDON, ENG.,
Plaintiff in Error,

vs.

THE COUNTY OF COOS IN THE STATE OF NEW HAMPSHIRE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

Brief for the Defendant in Error.

S. R. BOND,
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Brief for the Defendant in Error.

I.

1. It appears from the record that the alterations and repairs upon the insured premises had been completed before the fire took place. Record, pp. 11, 12.

2. No evidence was introduced at the trial tending to show that the fire resulted from the working of mechanics in the building, or that it was in any way connected with what had been done in making the alterations and repairs.

3. The finding of the jury establishes the fact that the risk was not increased by the alterations and repairs beyond

what it was when the policy was first executed. This was a question of fact, which the court below properly left to the jury to determine.

Rice v. Tower, 1 Gray, 426.

Cornish v. Farm Buildings Fire Ins. Co., 74 N.Y. 295.

The question upon which the case turns is therefore this: did the repairs and alterations made by the defendant in error upon its court-house, though not resulting in an increase of risk, though completed at the time when the fire occurred, and though not in any way the cause of the fire, nevertheless have the effect of avoiding the policy, under the condition therein contained declaring that "this policy shall be void and of no effect, if without notice to the company and permission therefor in writing endorsed hereon" * * "mechanics are employed in building, altering, or repairing the premises named herein"?

II.

The court will not stick in the letter of this isolated condition, if by so doing the unmistakable general purpose of the contract is defeated. This principle of construction, which is of general application, has peculiar force as applied to contracts of insurance, which are construed liberally in favor of the insured.

Cronsillat v. Ball, 3 Yeates, (Pa.), 375.

MILLER, J., in *Insurance Companies v Wright*, 1 Wall. 456, 468.

HARLAN, J., in *National Bank v. Ins. Co.*, 95 U. S. 673, 679.

Harper v. Albany Mut. Ins. Co., 17 N. Y. 194, 198.

III.

Clearly this condition cannot be construed according to the strict and literal meaning of the language in which it is expressed. Its sole object was evidently to protect the company against an increase in the risk, temporary or permanent. It cannot be taken to have been within the contemplation of the parties when they entered into the contract that the policy should become immediately and absolutely void, if the officers of the county should fail, in a single instance where repairs, however insignificant, were to be made upon the building, to give notice to the company and obtain its written permission therefor. See remarks of CLIFFORD, J., in *James v. Lycoming Ins. Co.*, quoted *infra*.

IV.

The condition must receive a reasonable construction. It is submitted that a reasonable construction would permit the making of such alterations and repairs as were incident to the ordinary use of the building, or reasonably necessary thereto, without requiring the officers of the county to go through the idle form of giving notice to the company and obtaining its written permission endorsed on the policy. The loss not having been occasioned by the making of the alterations and repairs, and the risk not having been permanently increased by them, it would be a purely technical construction of the condition in question which should give it the effect of depriving the defendant in error of the indemnity for which it contracted, and for which it has paid the consideration required from it by the company.

V.

The repairs and alterations made by the defendant in error upon the insured premises were incident to the ordinary use of the building as a court-house and for the county offices. The county had increased in population and business since the court-house was built, and it had become necessary to provide for a larger space in which to store the records. The enlargement of the vaults for this purpose was reasonably necessary in order to render the building suitable for the use for which it was designed and erected. The change in the heating arrangements was clearly an alteration of the same character.

VI.

James v. Lycoming Ins. Co., 4 Cliff. 272, is a direct adjudication upon facts similar in every respect to those in the case at bar. In that case a new boiler had been put into a steam mill, and other extensive changes and repairs had been made on the premises, and in an action on the policy the company defended under a condition identical with that upon which the plaintiff in error relies here. In an exhaustive opinion by CLIFFORD, J., the conclusion is reached that the condition in question, fairly construed, did not prohibit the making of reasonable and necessary changes and repairs, and that what had been done upon the insured premises came within that category. In the course of the opinion he says:

> "Attempt is made in argument to maintain that the structure erected to cover the pro-

jecting end of the new boiler, and the fireplace, and the man who feeds the boiler, is a greater change in the premises than the law of insurance will allow; but the agreed statement affords a complete and decisive answer to that suggestion, as it shows that the change made did not increase the risk, and that the structure erected was reasonable, necessary and proper for the purpose."

* * * *

"Whether regarded as a condition subsequent, or as a mere promissory warranty, the condition in question is not one where a literal compliance with its terms is required. Such a construction would be absurd, as it would render the policy void if the insured employed a mechanic to take out a broken slate and put in a new one, or to replace a broken pane of glass, or to stop a leak in a chandelier, or other gas fixture, or in a cistern, or to mend a defective chimney, stove-pipe or furnace."

* * * *

"Such a condition, however, must receive a reasonable construction in view of the agreed facts in the case, and that construction must be one not repugnant to the nature and purpose of the contract, nor one inconsistent with the due and customary use and enjoyment of the property."

* * * *

"Insurable property is intended for use, and it is not the intent of a policy of insurance to impair the right of use nor to deprive the owner of the customary enjoyment of the property."

* * * *

"But the effect of that concession [that small repairs may be made] is to admit that the condition in question is subject to a reasonable construction not repugnant to the nature and purpose of the contract, nor inconsistent with the due and customary use and enjoyment of the property." Pp. 276, 278, 280, 283, 284.

Other authorities to the same general effect are:

Franklin Fire Ins. Co. v. Chicago Ice Co., 36 Md. 102.

Kern v. So. St. Louis Mut. Ins. Co., 40 Mo. 19.

VII.

Of the numerous cases cited in the brief for the plaintiff in error only three involve the construction of a condition like the one in question. These are *Mack v. Rochester Ins. Co.*, 106 N. Y. 560; *Lindsey v. Ins. Co.*, 28 U. C. Q. B. 326; and *Lyman v. State Mutual Ins. Co.*, 14 Allen, 329. No one of these cases is an authority in support of the contention of the plaintiff in error. In *Mack v. Rochester Ins. Co.*, the alterations were not made for the purpose of rendering the building more suitable for the

use to which it was being put at the time the insurance was effected, but to adapt it to another and entirely different use. This materially distinguishes the case from that at bar. In *Lindsey v. Ins. Co.*, an addition was made to the premises insured, rendering the risk a larger one than that which the company had originally undertaken to assume. In *Lyman v. State Mutual Ins. Co.*, there was, as is said in the opinion of the court, p. 334, "a deliberate and considerable alteration of the building, *not incidental to the ordinary use of the property*."

S. R. BOND,
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Supreme Court of the United States

OCTOBER TERM, 1893.

No. 204.

THE IMPERIAL FIRE INSURANCE COMPANY OF LONDON, ENG.,
Plaintiff in Error,

vs.

THE COUNTY OF COOS IN THE STATE OF NEW HAMPSHIRE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

Supplemental Brief for the Defendant in Error.

S. R. BOND,
FLETCHER LADD.

Supreme Court of the United States

OCTOBER TERM, 1893.

No. 204.

THE IMPERIAL FIRE INSURANCE COMPANY OF LONDON, ENG.,
Plaintiff in Error,

vs.

THE COUNTY OF COOS IN THE STATE OF NEW HAMPSHIRE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

Supplemental Brief for the Defendant in Error.

We desire at this time simply to restate and emphasize very briefly the position upon which we rely in support of the judgment rendered below, and to direct the attention of the court to one or two cases strongly sustaining our contention, which have been decided since our former brief was filed.

What we say is this,—that an interpretation of the clause in dispute according to the bald, literal, and objective signification of the words employed, does violence to the manifest general purpose of the contract of insurance of which the clause forms a part, and that a logical interpretation of it must regard it as in effect a condition against an increase of risk, and nothing more. The object—the sole object—of each and

every condition in section 2 of the policy is to provide that the insurer shall at no time carry a risk greater than that originally contracted for, and that object, as respects the clause in question, is effectually attained by construing the clause as avoiding the policy in case the risk at the time of the loss has been rendered greater by reason of the thing prohibited, viz., the employment of mechanics in building, altering or repairing the premises, or in case the loss can be traced to any such employment of mechanics on the premises. If the employment of mechanics in building, altering or reparing the premises did not cause the loss, or have the effect of rendering the risk, as it existed at the time of the fire, an increased one beyond that assumed in the first instance, then the company has never really carried a greater risk than that which they undertook to carry in the beginning. This construction, therefore, gives the fullest measure of protection to the insurer. On the other hand, we have a contract which has acquired a settled and distinctive form and scope by centuries of use in every commercial country in the world, so that everyone who takes a fire insurance policy and pays the premium therefor is justified in assuming that he is getting a certain well-defined and substantial thing for his money, namely, a contract which protects him against the risk of loss by fire to which the insured property may be subject at any time during the term of the policy, provided, of course,—for this is entirely reasonable and just, and results from the general nature of the contract,—that the risk is not larger at the time of the fire than at the time of the issuing of the policy, and provided also,—for this also seems just to the insurer,—that the fire is not occasioned by any acts expressly enumerated and prohibited in the policy. And no court will countenance a mere verbal trap set by the insurer, such as the clause in question would be if construed as applicable to the facts of this case, and thereby defeat

entirely the general purpose of the contract, inflicting a heavy penalty upon the insured for no other reason than because he has made reasonable and ordinary repairs upon the insured property, by which the insurer has not been prejudiced in the slightest.

Shakespeare is now generally regarded as weak in his law where he makes Portia hold Shylock to a literal performance of the contract for the pound of flesh, thereby practically extinguishing the latter's security, it being generally admitted that the judgment, though correct in its result, should have been put upon other grounds. Courts now proceed more and more, especially in contracts of insurance, where every syllable of the language employed proceeds from the insurer, upon the doctrine of Paul, that "the letter killeth, but the spirit giveth life."

The next clause but one preceding that in question provides that the policy shall become void if, without notice to the company, etc., "there be kept, stored or used on the premises benzine, benzole, benzine varnish, burning fluid, camphene, fire-works, gasoline, gunpowder, naptha," and several other articles. *Record*, p. 5. Could it be pretended for a moment that the use of naptha or benzine for ordinary household purposes (unless the use caused the fire) would work a forfeiture of the policy? And is it not equally obvious that the strict language of the condition in question must be qualified to meet the demands of common sense, unless indeed the condition can be held wholly void as "unreasonable and defeating without merit the contract for indemnity?"

London & Liverpool Fire Insurance Co. v Crunk, infra.

The case of *London & Liverpool Fire Insurance Co. v. Crunk*, 91 Tenn. 376, presents an instance where an insurance company sought to escape liability for a loss, under a condition which, if construed literally, had taken effect to avoid the policy. The condition was as follows: "If the building, or any part thereof, fall, except as the result of fire, all insurance by such policy on such building or its contents, shall immediately cease." The building had been struck by a cyclone, and the roof of the two front upper rooms and a part of the walls blown away. The court below charged the jury as follows:

> "The exclusion clause in question is not to be literally understood, so as to avoid the policy if an atom, or some minute portion of the material in the insured building, should fall. It means some functional portion of the structure, the falling of which would destroy its distinctive character as such. So that, if the proof in this case shows that the roof was blown from a part of one of the buildings mentioned in the policy sued on, and one of the upper rooms was uncovered and one of the walls thereof partially blown away, but leaving more that three-fourths of the building intact, and suitable for a dwelling house, and that in this condition it was burned, the clause in the policy as to the falling of the building, or any part thereof, would not exempt defendant from liability, if otherwise liable, as before explained, unless you should believe from the proof that the falling was the direct cause of the fire. If the proof shows that the fire was scattered on the floor in one of the rooms of one of the insured houses by the wind;

> that some of it ignited the carpet and some of the furniture iu the room, and a strong wind blew the roof and a portion of the building upon it, and after smoldering a time it broke out and consumed the building; that the wind, and not the falling building, or a part thereof, caused the fire; that the fire and not the falling of the building, was the proximate and direct cause of the loss, you should find for the plaintiff, if defendant is otherwise liable, as before explained."

In the court above on error these instructions were held correct, and SNODGRASS, J., speaking for the whole court said:

> "The circuit judge drew the correct distinction. The falling of any part of a building in such a contract manifestly could not apply to any minute or fragmentary portion, as it might literally import. If so, the clause would be void as unreasonable, and defeating, without merit, the contract for indemnity. It cannot have such a technical or literal construction. Literalism being disregarded, the clause must have a fair and reasonable interpretation and construction, and that which is most favorable to indemnity —the object of the contract. Not having a literal meaning, and not definitely designating what material part of the building must fall before the fire to exempt the insurer from liability, it must, like all ambiguous clauses, be construed most favorably to indemnity, and against the insurer. It should therefore not have been construed as meaning any fragment or portion

> of a part of the building, but an integral part of the entire building, as was done by the circuit judge."

The very recent case of *First Congregational Church v. Holyoke Fire Insurance Co.*, 158 Mass. 475, is another instance in which the court read into a condition very similar to that here in question a qualification imperatively demanded by common sense and common justice, but unwarranted by any express language contained in the policy. There the policy sued on provided that "this policy shall be void if * * * without the assent in writing or in print of the company * * * the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risk; or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil may be used for lighting," etc. The property insured was a church edifice built of wood. A painter used a naphtha torch for several weeks to burn off the old paint on the building preparatory to repainting it, and finally the building caught fire where the torch had just been used, and was consumed. The report does not show precisely how the questions discussed in the opinion were raised, but KNOWLTON, J., with the concurrence of the rest of the court, says on the point to which we here cite the case:

> "On the undisputed facts as stated in the bill of exceptions, the only ground on which the plaintiff could fairly ask to present a question to the jury is upon its contention that the use of naphtha and the change in conditions affecting the risk occurred through making ordinary re-

pairs in a reasonable and proper way, and that in the provisions quoted from the policies there is an implied exception of what is done in making ordinary repairs. It is generally held that such provisions are not intended to prevent the making of necessary repairs, and the use of such means as are reasonably required for that purpose. *O'Neil v. Buffalo Insurance Co.*, 3 Comst. 122. *Dobson v. Sotheby*, Mood. & Malk. 90. *Franklin Insurance Co. v. Chicago Ice Co.* 36 Md. 102. *Billings v. Tolland County Insurance Co.* 20 Conn. 139. *Mears v. Humboldt Insurance Co.* 92 Penn. St. 15. *Williams v. New England Insurance Co.* 31 Maine, 219. *Putnam v. Commonwealth Insurance Co.* 18 Blatchf. C. C. 368. Both parties to a contract for insurance must be presumed to expect that the property will be preserved and kept in a proper condition by making repairs upon it. Policies on buildings are often issued for a term of five years or more. The making of ordinary repairs in a reasonable way may sometimes increase the risk more or less while the work is going on, or involve the use of an article whose use in a business carried on in the building is prohibited by the policy. In the absence of an express stipulation to that effect, a contract of insurance should not be held to forbid the making of ordinary repairs in a reasonably safe way, and provisions like these we are considering should not be deemed to apply to an increase of risk or to a use of an article necessary for the preserva-